gaged in the manufacture and sale, in interstate commerce, of bowling lanes and equipment. Logan Lanes operates an establishment for bowling and billiards in Cache County, Utah. On October 5, 1959, Logan Lanes purchased from Brunswick sixteen bowling lanes and necessary related equipment, for a cash price of $13,091.00 per lane.

Logan Lanes further alleged that, in March and April, 1964, Brunswick sold ten bowling lanes and related equipment of like grade and quality to the Board in the same county and state for $8,111.86 per lane. The bowling lanes and equipment sold to the Board were used in competition with Logan Lanes. Since 1964, Brunswick has continued to sell bowling equipment to the Board at a discount at from 17½ to twenty-five percent under the prices Brunswick charges Logan Lanes for similar equipment.

As a result of the indicated discrimination in prices, Logan Lanes alleged, it has not been able to compete successfully with the operation using the bowling lanes sold to the Board, because Logan Lanes must charge a higher fee for using its lanes. Consequently, the company alleged, it has sustained a loss of at least $200,282.78 which, trebled, amounts to $600,848.34.

Brunswick moved to dismiss the action upon the ground that the amended complaint failed to state a claim upon which relief can be granted. In opposition to the motion to dismiss, Logan Lanes filed six affidavits, and in support of the moton Brunswick filed three affidavits and several exhibits.

A number of additional facts are to be gleaned from the affidavits and exhibits. The bowling equipment purchased by the Board was installed in the Student Union Building on the Utah State University campus at Logan, Utah. The

bowling facilities were primarily for the use of students, faculty and staff of the Universtiy, but were also used by members of the public. One use the students make of such bowling equipment is to fulfill physical education requirements at the University. All income from the Student Union bowling alleys is used to finance student activity programs, or goes into a fund for expansion and improvement of the University.

Members of a University bowling league using the Student Union bowling alleys were charged the student rate, which is one dollar for three games, as compared to $1.35 for three games at Logan Lanes' bowling alley. The management of the Student Union lanes has declined to limit use of that equipment to persons associated with the University.

An affidavit submitted by Brunswick asserts that from July, 1964, when the new lanes were installed, to March 31, 1966, there were 128,349 lines bowled at the Student Union. Of these, according to this affidavit, 125,415 were bowled by student, faculty, staff and guests, while 2,934 were bowled by others. According to affidavits submitted by Logan Lanes however, no effort was made at the Student Union lanes to determine whether prospective customers were associated with the University.

In view of these affidavits and other materials filed in connection with the motion to dismiss, none of which were excluded, the trial court properly regarded the motion as one for summary judgment for defendant Brunswick.[2] Ruling that there was no genuine issue as to any material fact, the court granted Brunswick's motion to dismiss on these alternative grounds: (1) Brunswick's sale of bowling lanes and equipment to the Board is exempt from the applica-

tion of section 2(a) of the Act, 49 Stat. 1526 (1936), 15 U.S.C. §13(a) (1964),[3] pertaining to price discrimination, because that section was not intended to apply to sales made to a state; and (2) the sale in question is exempt from the application of section 2(a), because the Board's purchase of this equipment was a purchase of supplies for its own use by a university not operated for profit, within the meaning of 52 Stat. 446 (1938), 15 U.S.C. §13c (1964).[4]

Logan Lanes questions each of these grounds.

We consider first whether summary judgment for Brunswick was correctly granted on the latter ground, namely, that by reason of the 1938 statute exempting from the operation of the Act, certain purchases by universities and other non-profit institutions, these sales by Brunswick to the Board are exempt from the operation of section 2(a) of the Act.

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[2]See Rule 12(b), Federal Rules of Civil Procedure; *Erlich v. Glasner*, 9 Cir., ... F.2d ....., decided March 23, 1967.

[3]"**§13 Discrimination in price, services, or facilities — Price; selection of customers**

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

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[4]The 1938 statute, as it appears in 52 Stat. 446, reads as follows: "That nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

Logan Lanes argues that since this statute refers to "purchases" of supplies, this might imply that Congress meant to limit the exemption to the purchasing party, and not extend it to the party selling the goods to a non-profit institution.

For every purchase, however, there must be both a purchaser and a seller. It follows that if a particular purchase is exempt from the Act, both the seller and purchaser involved in that transaction are exempt. Moreover, the benefits in the form of lower prices which are expected to accrue to non-profit institutions by reason of this statute would be illusory if only the purchasing institution, but not the sellers thereto, were exempted. No seller would be able to give a non-profit institution the benefit of a lower price which was discriminatory under the Act, if such seller was not exempt from the sanctions of the Act in making the sale.

Logan Lanes also contends that "supplies" as used in the 1938 statute, means only items of stock, materials and provisions needed to carry on daily operations, and does not include such capital items as bowling lanes.

The word "supplies," as used in this statute, is not defined. In general usage the term is sometimes meant to apply in a restricted sense. As an example, the term may be used to designate substances that are consumed with their use, and which do not enter into, and become a physical part of, a finished product.

As used in this statute, however, we think the term "supplies" is used in a more general sense. It embraces anything required to meet the institution's needs, whether it is consumed or otherwise disposed of, or whether it constitutes, or becomes part of, a material object utilized to enable the institution to carry on its activities.

We reach this conclusion because we perceive no reason why, in granting such an exemption to nonprofit institutions, Congress would wish to distinguish between purchased articles which are to be consumed, and those which are not. The underlying intent of granting such an exemption was undoubtedly to permit institutions which are not in business for a profit to operate as inexpensively as possible. This intent would be substantially thwarted if the term "supplies" was given the restricted construction urged by Logan Lanes. It is axiomatic that courts strive to adopt that construction of a statute which best effectuates the legislative purpose. See *Reich v. Webb*, 9 Cir., 336 F.2d 153, 157.

Logan Lanes further asserts that there are genuine issues of material fact under the 1938 statute as to whether the purchases in question were made: (1) by a university not operated for profit, and (2) for its "own use." These respective questions, Logan Lanes states, arise: (1) because the materials purchased are used in a student-union building which may be self-sustaining and which may not be a part of the university, and (2) because, to an extent not clearly established in the pleadings and affidavits, the bowling equipment is used by members of the public. Logan Lanes argues, therefore, that a summary judgment should not have been entered by the district court because there were genuine issues as to material facts. See Rule 56(c) Federal Rules of Civil Procedure.

Our review of the record convinces us that there is no genuine issue of material fact as to these matters. It is undisputed that the Student Union Building is on the campus of Utah State University, that the bowling facilities are used by the students, faculty and staff of the Unversity, and that one use the students make of this equipment is to fulfill physical education requirements at the University.

It is also undisputed that all net income from these bowling alleys is used to finance student activity programs or the expansion and improvement of the University. Logan Lanes does not contend that any excess of revenue over expenses resulting from the operation of the bowling alleys, or of any other activity conducted in the Student Union Building or elsewhere on the campus, is distributed to any private person or company as a profit.

The only genuine issue of fact which appears to be in the case concerns the exact amount of public use of the bowling lanes. As noted above, Brunswick has presented affidavits tending to show that 125,415 lines were bowled by students, faculty, staff and guests, while 2,934 lines were bowled by members of the public. Logan Lanes, on the other hand, has presented affidavits tending to show that no effort was made at the Student Union lanes to determine which customers were members of the public and which were not.

In view of all of the other circumstances referred to above, as to which there is no genuine issue of fact, we do not believe that the issue of fact concerning the exact amount of public use of the bowling lanes is material. Assuming that the public made substantial use of the University bowling facilities, we would still conclude that, within the meaning of the 1938 statute, the purchases in question were made by a university not operated for profit, for its own use.

The primary purpose of the purchases, established beyond dispute, was to fulfill the needs of the University in providing bowling facilities for its students, faculty and staff. This being the case, any additional use of the bowling facilities by the general public for a fee, even if such use is substantial, would not establish that the purchases were

made for the use of the University. This is true because to the extent that the facilities are used by persons other than students, faculty and staff, the net proceeds of such additional use are utilized exclusively for University purposes.

Logan Lanes suggests that the purchases in question may not have been made for the University, but for a self-sustaining student activity carried on in the Student Union Building, and that this can be determined only by a full development of the facts. *Student Book Company v. Washington Law Book Company,* D.C. Cir., 232 F.2d 49, is cited in support of this view.

That case involved an alleged price discrimination by the defendant, a law book publishing company, in selling law books to self-sustaining campus book stores at preferential prices as compared to the prices it charged the plaintiff, a privately operated retail book store. The court held that sales to self-sustaining campus book stores for resale at a profit are not sales to universities for the use of the universities within the meaning of section 13c of the Act. 232 F.2d at 50, n. 5.[5] In our case, however, it is undisputed that the bowling lanes installed in the Student Union are used as part of the University's physical education program and are also used as recreational facilities for the students, faculty and staff. We think the case before us is distinguishable from the *Student Book Company* case.

We conclude that the district court did not err in granting summary judgment for Brunswick on the basis of the university exemption set out in the 1938 statute. We therefore do not reach the question of whether the so-called governmental exemption also provides a sufficient basis for granting summary judgment.

Affirmed.

[5]The defendant nevertheless prevailed on another ground.

Appendix B

MEMORANDUM OF OPINION

Plaintiff brought this action under and pursuant to Title 15 U.S.C. Sections 13 and 15. The cause is presently before the court on defendant's motion to dismiss alleging that that complaint fails to state a claim upon which relief can be granted. The parties have submitted affidavits and briefs in support of their respective contentions. On May 20, 1966, the court heard oral argument of counsel on said motion and the matter was submitted for consideration.

Since it does not appear that there is a genuine issue of fact in regard to the principal questions presented, counsel have treated and the court shall consider the motion to dismiss as a motion for summary judgment as authorized under Rule 12 of the Federal Rules of Civil Procedure.

It is agreed that plaintiff has been and still is in the business of operating public bowling lanes; that on or about October 5, 1959, it entered into a contract with the defendant to purchase certain bowling machinery and supplies to be used in plaintiff's business; that since that time plaintiff has annually purchased supplies from the defendant; that on or about March and April of 1964, the defendant sold simliar machinery and supplies to the Utah State Building Board at a lower unit price than the price for which defendant sold similar machinery and supplies to the plaintiff. Plaintiff alleges and claims that said machinery and supplies purchased by the Utah State Building Board were being used in competition with the plaintiff.

At the hearing on the motion, counsel for plaintiff readily admitted that the Utah State Building Board is a govern-

mental body acting in behalf of the State of Utah, and, that the machinery and supplies procured by said body was for the Utah State University located in the same county as the plaintiff's business.

It appears that said machinery and supplies acquired by the Utah State Building Board were placed in a building at the Utah State University which is owned by said University through its governing board known as the Board of Trustees. It is admitted that the bowling and recreation facilities located in the Union Building at the University are used in the physical education program of the school and that, in addition, the students and faculty are allowed to use the facilities. It is indicated that a small percentage of the public uses said facilities for bowling. The income from the school's bowling alley and game room is used, together with other revenue from the Union Building, to finance activity programs for the students and any surplus money remaining after financing this activity is placed in a Dormitory-Union Building Reserve Account for expansion and improvement.

Plaintiff urges that the defendant has violated Title 15 U.S.C.A. §13(a), (c), (d), and (e), commonly referred to as a part of the Robinson-Patman Act. Since plaintiff has not alleged and does not claim a sale for resale, concealed brokerage or commission payments, or payments for promotional activities, there is no merit to the contention of a violation of subsections (c), (d), and (e). The only contention that may have any merit is the claim in regard to a violation of subsection (a) of the Act.

Title 15 U.S.C.A. §13(a) provides, in part, as follows:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either di-

rectly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *"

The principal question is whether a sale to a sovereign, here the State of Utah, renders the seller immune from actions brought pursuant to Title 15 U.S.C.A. §13(a) of the Robinson-Patman Act. There have been very few cases in which this problem has arisen. These cases appear to stand for the proposition that the Robinson-Patman Act does not apply to sales to a sovereign. See *Sperry Rand Corp. v. Nassau Research & Development Associates, Inc.*, 152 F. Supp. 91, 96 (E.D.N.Y. 1957); *Sachs v. Brown-Forman Distillers Corp.*, 134 F.Supp. 9, 16 (S.D.N.Y. 1955), aff'd per curiam 234 F.2d 959 (2nd Cir. 1956); *General Shale Products Corp. v. Struck Construction Co.*, 37 F. Supp. 598, 602-603 (W.D. Ky. 1941), aff'd on other grounds 132 F.2d 425 (6th Cir. 1942). In the case of *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (1965), the 9th Circuit Court of Appeals, in affirming a case arising in the State of Idaho, after considering the authorities presently before this court, stated on pages 858-859 as follows:

"Defendants also argue, with regard to the general applicability of section 2(c), that sales to a sovereign are excluded, and hence payments made to Grimes in connection with Rangen's sales to the State of Idaho are not covered by that subsection. Several district courts have apparently so ruled, on the theory that

such an exemption is required by the policy which allows the sovereign to buy at the best price obtainable.

"Assuming that there is such a policy and that it gives rise to such an exemption in an appropriate case, it has no room to operate here."

It is noted that the foregoing case dealt with the problem of "commercial bribery" while the case presently before this court is one of an alleged price discrimination. This court is of the opinion that the case here exemplifies the right of a sovereign to make purchases at the best price possible regardless of the price which the same or similar products may be sold to the public. If this should not be the correct observation, then the implications in denying such immunity shall have far reaching effect on the present day governmental purchasing procedures. It is common knowledge that a sovereign does bargain for the best price obtainable. This court is of the opinion that under the admitted facts of the case here, the sale to the sovereign State of Utah does not come within the provisions of the Robinson-Patman Act.

If it is assumed that a sale to a sovereign is subject to the provisions of the Robinson-Patman Act, then the question arises as to whether the defendant would be entitled to the exemption as provided in Title 15 U.S.C.A. §13(c) which provides as follows:

"Nothing in sections 13-13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities * * * not operated for profit."

It is clear from the facts in this case that the bowling and recreational facilities in the Union Building at the University were purchased, operated and maintained primarily for the benefit of the school and the students there in attendance; that any profit or income arising from the operation of said facilities is purely incidental to the University's programs. Obviously, the Universty is not operated for profit. Under the facts in this case, this court is of the opinion that the defendant would be entitled to the exemption afforded by Title 15 U.S.C.A. §13c.

Since this court has expressed its opinion in regard to the two principal questions presented, it is not necessary to consider the question whether the sales alleged in the complaint are contemporaneous, or proximate in time, so as to bring them within the purview of the alleged price discrimination.

Accordingly, it is Order that defendant's motion be, and the same hereby is, granted.

Counsel for the defendant shall prepare a proposed Judgment, submit a copy thereof to counsel for the plaintiff and the original to the court.

Dated at Boise, Idaho, this 26th day of May, 1966.

FRED M. TAYLOR
United States District Judge

Appendix C

Section 2 of the Clayton Act, 38 Stat. 731 §2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, §1 (1936), 15 U.S.C. §13 (1952).

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing

shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for serv-

ices rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

The 1938 amendment to the Robinson-Patman Act, 52 Stat. 446 (1938), 15 U.S.C. 13(c) (1964).

> "That nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Anti-discrimination Act, shall apply to purchases of their supplies, for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

Section 4 of the Clayton Act, 38 Stat. 731, §4 (1914), 15 U.S.C. §15 (1952).

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Appendix D

MR. LLOYD. Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

MR. TEEGARDEN. Not unless the present Clayton Act does so. So far as that problem is concerned, it is no different from that which exists under the present Clayton Act.

MR. LLOYD. For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is $35. The Procurement Division procures them delivered, one at a time, for $13.18. Now, would that discount be barred by this bill?

MR. TEEGARDEN. I do not see why it should, unless a discount contrary to the present bill would be barred — that is, the present law — would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition with other buyers from these concerns.* Therefore a discrimination — it is so applied universally in interstate commerce law, in the railroad law — *to have a discrimination, there must be a relative position between the parties to the discrimination whch constitutes an injury to one as against the other. I think the answer is to be found in that.*

In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

The Federal Government is saved by the same distinction, not of location but of function. They are not in competition with anyone else who would buy.

MR. HANCOCK. It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

MR. TEEGARDEN. You mean competitive bidding on Government orders?

MR. HANCOCK. Government, State, city, municipality.

MR. TEEGARDEN. No; I think not.

MR. MICHENER. If it did do it, you would not want it, would you?

MR. TEEGARDEN. No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

MR. HANCOCK. You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

MR. TEEGARDEN. No.

MR. HANCOCK. Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

MR. TEEGARDEN. I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.* (Emphasis added)